

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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AUG 22 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21, and 25)
of the Commission's Rules to Redesignate)
the 27.5-29.5 GHz Frequency Band, to)
Reallocate the 29.5-30.0 GHz Frequency Band,)
to Establish Rules and Policies for Local)
Multipoint Distribution Service and for)
Fixed Satellite Services)

CC Docket No. 92-297

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

U S WEST, INC. REPLY COMMENTS

U S WEST, Inc. ("U S WEST") hereby responds to certain comments filed in the above-captioned docket.¹ In this proceeding, the Federal Communications Commission ("Commission") has chosen to reconsider its position that there should be open eligibility for the provision of local multipoint distribution service ("LMDS"). Despite the accumulation of a four-year record that supports open eligibility, the Commission once again questions whether there should be restrictions on incumbent local exchange carrier ("LEC") or cable operator participation in this new service. As U S WEST and most of the other commenters demonstrated in their comments, the Telecommunications Act of 1996² does nothing to change the

¹ In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Fourth Notice of Proposed Rule Making, FCC 96-311, rel. July 22, 1996 ("NPRM").

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

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Commission's previous determination that there are no legal bars to LEC/cable operator participation.³ Moreover, contrary to the claims of a few commenters, open eligibility is in accord with the 1996 Act and serves the public interest.

I. LECS AND CABLE OPERATORS WILL PROVIDE ECONOMIES OF SCOPE AND SCALE IN THE PROVISION OF LMDS

MCI Telecommunications Corporation ("MCI") asserts that there are no cost, size, experience or financial advantages possessed by incumbent LECs or cable operators which would promote the provision of LMDS.⁴ MCI either does not understand LMDS technology (and business in general), or is placing its own anticompetitive interests above the public interest.⁵ Our experience makes us uniquely positioned to provide LMDS. In addition, there is, in fact, a natural syn-

³ See, e.g., Comments of United States Telephone Association filed Aug. 12, 1996 at 5 ("USTA"); Comments of Ad Hoc Rural Telecommunications Group filed Aug. 12, 1996 at 3; Comments of Ameritech filed Aug. 12, 1996 at 2-3.

⁴ MCI filed Aug. 12, 1996 at 5. See also WebCel Communications, Inc. filed Aug. 12, 1996 at 21. MCI's own anticompetitive interests are obvious. MCI claims that LECs/cable operators have no right to compete because they bring nothing unique to the service. In other proceedings, MCI has argued that entry should be restricted because potential providers have certain inherent advantages. This is not sound economic reasoning that should support imposition of a barrier to entry into the LMDS market.

⁵ MCI also insinuates that even if economies of scope or scale exist, LECs and cable operators should be restricted from providing LMDS as punishment for not deploying Asymmetric Digital Subscriber Line ("ADSL") and cable modem technologies. MCI at 6. See also WebCel at 22. As MCI and WebCel should know, deployment of ADSL and cable modems requires extensive testing and network upgrades. Testing is ongoing and actual deployment has taken place in certain markets. See, e.g., Interactive Video News, August 5, 1996; LAN Magazine, August 1996; OEM Magazine, August 1996.

ergy between wireline telephony and cable and LMDS which will allow LECs and cable operators to provide this new service more rapidly and less expensively than non-LEC/cable operators initially can.

As developed in the 28 GHz band, LMDS systems require cells with radii of 3 to 6 miles.⁶ To provide viable service to a metropolitan area, several hundred cells are necessary. This large number of cells, in turn, demands a significant investment in infrastructure to provide headend-to-cell or switch-to-cell transport. In their respective service areas, both cable operators and LECs already have an embedded base of fiber optic cable used to serve their current respective business applications. Conversely, it will take non-cable/LEC LMDS providers time to not only raise the substantial capital for ubiquitous coverage in a metropolitan area but also to actually deploy such a network. To preclude a LEC or cable operator from taking advantage of existing fiber capacity to serve these cell sites denies the public cost-effective and rapid availability of LMDS.⁷

⁶ In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd. 2060, 2097 ¶ 84 (1995).

⁷ See Comments of Bell Atlantic Corporation/SBC Communications, Inc. filed Aug. 12, 1996 generally; USTA at 6, 8; Comments of National Telephone Cooperative Association filed Aug. 12, 1996 at 8-9.

II. ANTICOMPETITIVE CONCERNS ARE UNSUBSTANTIATED AND MISPLACED

MCI also repeats the tired claim that LECs and cable operators will acquire LMDS spectrum for the sole purpose of staving off competition.⁸ U S WEST predicted in its comments that there would be no hard evidence proffered in this comment phase (consistent with the four-year record in this docket) that either LECs or cable operators will engage in any such anticompetitive behavior. The comments of MCI and others seeking to thwart competition support that conclusion. No one has provided any documentation substantiating the claim that LECs/cable operators would (foolishly) spend extraordinary sums of money and risk forfeiture for non-compliance with Commission build-out and permissible use rules.⁹ LECs/cable operators will zealously seek a return on their auction investment. Warehousing spectrum makes no economic sense, as it will not provide any such return. Moreover, as discussed by U S WEST and several other commenters, the Commission's

⁸ MCI at 4. And see WebCel at 22-23.

⁹ Some commenters fatuously imply that LECs/cable operators will, if not warehouse LMDS spectrum, fail to fully exploit the spectrum or will utilize it for purposes other than those mandated by the Commission's rules. See, e.g., Comments of CellularVision Technology and Telecommunications, L.P. filed Aug. 12, 1996 at 3; WebCel at 23; Comments of Competition Policy Institute filed Aug. 12, 1996 at 6. As discussed by U S WEST and several commenters, LMDS auction winners, whether they be a LEC, a cable operator, or a so-called new entrant, will eagerly seek a return on the auction and related construction investment. In addition, the Commission's spectrum service rules generally include a subsection dictating specific use and operation. See, e.g., 47 CFR §§ 21.903, 22.901. It is highly unlikely that the Commission will not promulgate such a rule for LMDS, and even more unlikely that LECs and cable operators would not follow that rule -- and risk being assessed Commission fines -- in an attempt to obstruct competition.

proposed build-out requirements require expeditious deployment of LMDS to the public. No LEC or cable operator would jeopardize its position as a Commission licensee, and in fact its business, in an attempt to stop competition via contravention of the Commission's rules.

Another commenter, ComTech Associates, Inc. ("ComTech"), believes that LECs and multiple system operators ("MSO") should be prohibited from offering LMDS in-region until: 1) with respect to LECs, the Section 271 checklist of the 1996 Act has been met; and 2) with respect to cable operators, effective competition, as defined in Section 623 of the Communications Act of 1934, as amended, has been achieved.¹⁰ There is no basis in law for doing so. Each of these provisions was developed with a particular purpose in mind and should in no way be applied to the provision of LMDS. Section 271 is strictly applicable to Regional Bell Operating Companies ("RBOC") and sets forth several benchmarks that must be met before RBOCs will be authorized to provide in-region interLATA service only. Moreover, the 1996 Act strictly forbids the Commission from adding to the checklist.¹¹ To extend the checklist to LMDS eligibility would be a violation of the 1996 Act. Similarly, the definition of effective competition as provided in Section 623 is applicable only to rate regulation issues. Neither Section 271 nor Section 623 contains any statement of applicability to the provision of LMDS.

¹⁰ Comments of ComTech filed Aug. 12, 1996 at 10.

¹¹ 1996 Act, 110 Stat. 90 § 271(d)(4).

Finally, SkyOptics, Inc. ("SkyOptics"), engages in faulty antitrust analysis to justify excluding completely LECs and cable operators from the LMDS auctions.¹² SkyOptics argues initially, correctly, that the antitrust laws apply to the telecommunications industry. Remarkably, SkyOptics then requests that the Commission prevent those laws from being applied by passing regulations that would neutralize the very evaluations of competitive actions the antitrust laws require.¹³ If the acquisition of an LMDS license is prohibited by antitrust laws, there is no need for the Commission to prohibit such acquisition. That is, if the antitrust laws do not prohibit LECs or cable companies from acquiring those licenses (because such acquisitions would not harm, and indeed could benefit, competition), then Commission regulation would be overly broad and actually would reduce competition and promote inefficiency. SkyOptics' half-hearted attempt at market analysis omits critical elements and is thoroughly inaccurate.

Inflexible cross-ownership rules are valuable only when two critical elements are present: 1) the prohibited activities are almost always harmful to competition; and 2) detection of possible violations is difficult and, therefore, enforcement is not cost-effective. Here, it is clear that neither condition is met. As outlined above and in U S WEST's comments, a cable operator or LEC may prove to be the best owner of an LMDS license in a given area; hence, prohibiting them from competing for LMDS spectrum will not only not benefit competition, it will harm it.¹⁴ Second, the

¹² Comments of SkyOptics filed Aug. 9, 1996 at 3-8; compare MCI at 9.

¹³ SkyOptics at 3-8.

¹⁴ Comments of U S WEST filed Aug. 12, 1996 at 3-4.

acquisition of LMDS licenses, far from being covert, will be a matter of public record, and subject to easy evaluation. There are no impediments to standard antitrust review. Because the potential benefits to the public of LEC or cable competition in LMDS auctions and services (speed to market, utilization for less-served areas, economies of scope and scale) are numerous and enforcement opportunities clear, bright-line rules prohibiting competition can serve only narrow special interests. One antitrust scholar has noted that “prohibitory rules create their own constituencies.”¹⁵ The only beneficiaries of an LMDS cross-ownership rule are those protected from competition.

Although SkyOptics offers what it asserts to be an analysis of the concentration of various markets, its analysis is so shallow and selective that its conclusions are meaningless. SkyOptics asserts, with no factual support whatsoever, that the appropriate product markets for LMDS evaluation “are the services presently offered by incumbent LECs and cable operators.”¹⁶ In fact, product market definitions necessarily applicable to LMDS are as varied as point-to-point services, video distribution, wireless telephony, video conferencing, tele-medicine, distance learning, and a host of other services. Assuming that a LEC or cable operator will use the spectrum simply to duplicate its own existing operations is to assume the very conclusion SkyOptics wants to reach. Although considerable facts should be gathered before any conclusions could be drawn, *ex ante*, it seems much more plausible to as-

¹⁵ Frank Easterbrook, “The Limits of Antitrust,” 63 Tex. L. Rev. 1, 6 (1984).

¹⁶ SkyOptics at 4.

sume that LECs will use the spectrum to provide video (present market share of 0% in most areas), and that cable companies will use the spectrum to provide telephone service (present market share of 0% in most areas). Of course, if such preliminary conclusions were ultimately correct, the appropriate Herfindahl-Hirschman Index (“HHI”) calculations would demonstrate no additional concentration at all. SkyOptics, however, picks and chooses its product market definition, depending on whose competition it is trying to avoid.

SkyOptics’ flawed reasoning aside, the critical point is that LMDS cannot be pigeon-holed into a single service product market. Most of the products LMDS may provide have not yet been fully defined. In fact, LMDS may serve them all. Commenters seeking to limit their competition in auctions and after-market transactions naturally request regulatory intervention to avert potential competition. To yield to such requests would work directly contrary to the expressed intent of the 1996 Act and must be rejected.

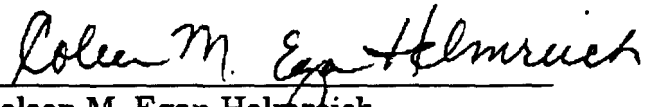
III. CONCLUSION

Rapid, economic provision of LMDS, and not inflated, unsupported protectionist statements, should ordain who should be eligible to participate in the provision of LMDS. Accordingly, the Commission should not engage in arbitrary

rulemaking, but affirm its original determination that all entities are eligible to bid for all available LMDS spectrum.

Respectfully submitted,

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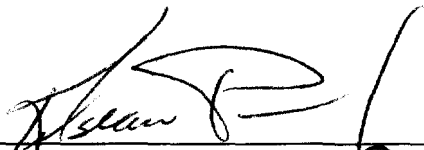
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August 22, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 22nd day of August, 1996, I have caused a copy of the foregoing **U S WEST, INC. REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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